



FEDERAL ELECTION COMMISSION
WASHINGTON D.C. 20543

AUG 14 2004

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

J. Curtis Herge, Esq.
Herge, Sparks & Christopher, LLP
Suite 360
6862 Elm Street
McLean, VA 22101

RE MUR 5333
Bodee Gay, Dennis Gay, Gina Gay,
Kim Gay and Haley Gay

Dear Mr. Herge:

On November 21, 2002, the Federal Election Commission notified your clients, Bodee Gay, Dennis Gay, Gina Gay, and Kim Gay, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint was forwarded to your clients at that time.

Upon further review of the allegations contained in the complaint, and information provided by your clients, the Commission, on June 30, 2004, found that there is reason to believe Bodee Gay violated 2 U.S.C. § 441f, Dennis Gay violated 2 U.S.C. §§ 441a(a)(1)(A), 441b(a) and 441f, Gina Gay violated 2 U.S.C. §§ 441a(a)(1)(A) and 441f, Kim Gay violated 2 U.S.C. § 441f, and Haley Gay violated 2 U.S.C. § 441f. The Factual and Legal Analysis, which formed a basis for the Commission's findings, is attached for your information. Also on June 30, 2004, the Commission determined to take no action at this time with respect to Bodee Gay or Kim Gay regarding the allegation in the complaint that they violated 2 U.S.C. § 441a(a)(1)(A).

You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter. Please submit such materials to the General Counsel's Office within 30 days of your receipt of this letter.

Statements should be submitted under oath. In the absence of additional information, the Commission may find probable cause to believe that a violation has occurred.


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Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A), unless you notify the Commission in writing that you wish the investigation to be made public.

If you have any questions, please contact Mark Allen, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,


Bradley A. Smith
Chairman

Enclosures
Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: Bodee Gay, Dennis Gay, Gina Gay, Kim Gay MUR 5333
and Haley Gay

I. GENERATION OF MATTER

This matter was generated by a complaint filed with the Federal Election Commission by Scott Clayton and based on information ascertained by the Federal Election Commission ("the Commission") in the normal course of carrying out its supervisory responsibilities See 2 U S C § 437g(a)(1) and (2)

II. FACTUAL AND LEGAL ANALYSIS

A. Complaint and responses and other available information

The complaint alleges that Bodee Gay, Dennis Gay, Gina Gay and Kim Gay made excessive contributions to John Swallow for Congress ("Committee"). The complaint listed each of these individuals as contributing \$2,000 to the Committee The Committee disclosed the receipt from each Gay of \$1,000, which was designated for the convention, on March 31, 2002, and \$1,000 which was designated for the general election, on June 28, 2002 As reported on the Committee's disclosure reports, therefore, these contributions are within the limits of 2 U S C § 441a(a)(1)(A)

The available information indicates that the Gay contributions were made by checks drawn on the account of Winterhawk Enterprises ("Winterhawk") and attributed to the several

- 1 Gay contributors, as set forth in the chart below Winterhawk is a limited liability company
2 (“LLC”) identified in public records as an active LLC organized in Utah ¹

Check drawn on account	Check date	Amount	Attributed persons (\$1,000 each)
Winterhawk Enterprises	3/29/02	\$4,000	Dennis Gay, Gina Gay, Bodee Gay, Kim Gay
Winterhawk Enterprises	6/21/02	\$5,000	Dennis Gay, Gina Gay, Bodee Gay, Kim Gay, Haley Gay

3
4 In the first instance, Winterhawk wrote a \$4,000 check to the Committee dated March 29,
5 2002 The signature on the check appears to be that of Dennis Gay and the memo line reads
6 “Dennis, Gina, Bodee, Kim Campaign Donation.” The Committee sent a letter to Winterhawk,
7 dated March 31, 2002, expressing thanks for the contribution and then stating

8 The strict Federal Election Commission regulations [prohibit] making contributions on
9 behalf of someone else to federal election campaigns We must refund this money to you
10 within thirty (30) days unless you can establish in writing that the contribution came from
11 personal funds of a corporate drawing account, such as a draw against salary, wages,
12 dividends, etc Please confirm that such was indeed the case with this check by signing
13 below .
14

15 The letter provides fields for the signature, occupation, employer and date of each Gay. The
16 completed fields contain the signatures of all four individuals dated April 10, 2002, and identify
17 “Majestic ent,”² as the employer of all four individuals ³

18 The available information also indicates that Winterhawk wrote a \$5,000 check to the
19 Committee on June 21, 2002. The signature on the check appears to be that of Dennis Gay and
20 the memo line reads “Dennis, Gina, Bodee, Kim, Haley Campaign Dona” [sic] The Committee

¹ Winterhawk is listed in public records as Winterhawk Enterprises, LLC

² Utah state records indicate three business entities whose names start with “Majestic ent,” all of which are expired Nevada state records list “Majestic Media Holdings, Inc ,” with Gina Gay as president and Dennis Gay as secretary and treasurer

³ The Committee’s disclosure report identified Winterhawk as the employer of all four individuals

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1 sent a copy of an undated letter to Winterhawk regarding the contribution, identical to its
2 March 31, 2002 letter to Winterhawk. The Committee's undated letter makes no mention of
3 Haley Gay, the fifth attributed contributor. The completed fields contain the signatures of the
4 four Gay contributors, with dates ranging from September 20 to September 25, 2002, and
5 identify "Majestic" as the employer of three individuals.⁴

6 The four Gays notified of the complaint, Dennis, Gina, Bodee, and Kim, submitted
7 identical responses to the complaint, each one stating a belief that they had "followed the
8 regulations of the FEC" and were allowed to contribute \$1,000 for each of the three elections
9 involving John Swallow.⁵ Attached to each Gay response was a "Receipt Transaction List,"
10 apparently from a Committee database, that listed the contributor's contributions as \$1,000 for
11 the convention and general elections.⁶

12 **B. Law on contributions by LLCs, corporations and partnerships**

13 The Commission's regulations establish two possible treatments for contributions by
14 business entities that are recognized as limited liability companies under the laws of the State in
15 which they are established. 11 C.F.R. § 110.1(g)(1). The treatment depends on how the firm
16 elects to file with the Internal Revenue Service ("IRS"). *Id.* at 110.1(g)(2). If the contribution is
17 from an LLC filing with the IRS as a partnership pursuant to 26 C.F.R. § 301.7701-3, or from
18 one that fails to make an election, it shall be treated as a contribution from a partnership pursuant
19 to 11 C.F.R. § 110.1(e). *Id.* If the contribution is from an LLC electing to file with the IRS as a
20 corporation, the contribution is prohibited. 2 U.S.C. § 441b(a) and 11 C.F.R. § 110.1(g)(3). An

⁴ The employer field is blank for the fourth individual, Dennis Gay. The Committee disclosed Winterhawk as the employer of all four individuals.

⁵ The Gay responses are undated and were received on December 23, 2002.

⁶ Haley Gay, the fifth individual to whom the June 21, 2002 Winterhawk check was attributed, although not named in the complaint, filed a response to the complaint identical to those of the four Gays named in the complaint.

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1 LLC that makes a contribution pursuant to this provision shall, at the time it makes the
2 contribution, provide information to the recipient committee as to how the contribution is to be
3 attributed, and affirm to the recipient committee that it is eligible to make the contribution.
4 11 C.F.R. § 110.1(g)(5).

5 The Federal Election Campaign Act of 1971, as amended (“the Act”), prohibits
6 corporations from making contributions in connection with any election and prohibits any
7 candidate or political committee from knowingly accepting or receiving any such contributions
8 2 U.S.C. § 441b(a). In addition, section 441b(a) prohibits any officer or director of any
9 corporation from consenting to any contribution by the corporation. The Commission has
10 recognized, however, limited circumstances in which a corporate employee may make a
11 contribution drawn on a corporate account, specifically, a nonrepayable corporate drawing
12 account established to permit an employee to draw against her salary, profits or other
13 compensation. *See Campaign Guide for Congressional Candidates and Committees* (2002),
14 page 21, *FEC Record*, September 1978, page 1.⁷ Contributions may not be made from the
15 general treasury fund of corporations. *See* 2 U.S.C. § 441b(a); *cf. FEC v. Massachusetts Citizens*
16 *for Life*, 479 U.S. 238, 241 (1986).

17 A contribution by a partnership shall be attributed to the partnership and to each partner
18 in one of two ways: 1) in proportion to his or her share of the profits, according to instructions
19 which shall be provided by the partnership to the political committee or candidate, or 2) by
20 agreement of the partners, as long as only the profits of the partners to whom the contribution is

⁷ The only place in the Act or the Commission’s regulations that specifically addresses the making of contributions through nonrepayable corporate drawing accounts is in the context of contributions to separate segregated funds. *See* 11 C.F.R. § 102.6(c)(3). This regulation provides that a contributor may write a check that represents both a contribution and payment of dues or other fees that must be drawn on the contributor’s personal checking account or on a “non-repayable corporate drawing account of the individual contributor.” *Id.* *See also* Explanation and Justification, 48 Fed. Reg. 26,297 (June 7, 1983).

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1 attributed are reduced (or losses increased), and these partners' profits are reduced (or losses
2 increased) in proportion to the contribution attributed to each of them 11 C.F.R. § 110 1(e) A
3 contribution by a partnership shall not exceed the Act's limitations on contributions, and no
4 portion of such contribution may be made from the profits of a corporation that is a partner *Id*

5 **C. Analysis of contributions**

6 Winterhawk, an LLC, wrote \$9,000 in contribution checks to the Committee
7 Winterhawk attributed this amount to Bodee Gay, Dennis Gay, Gina Gay, Kim Gay and Haley
8 Gay No contributions were attributed to the LLC itself The threshold question regarding LLC
9 contributions is whether the LLC is to be treated as a corporation or as a partnership, which
10 depends on whether the LLC elected federal income tax treatment as a corporation *See*
11 11 C F R. § 110 1(g) The available information does not indicate whether Winterhawk elected
12 tax treatment as a corporation.

13 The Winterhawk checks on their face attribute the contributions among several
14 individuals, but it does not appear that the LLC affirmed to the Committee that it is eligible as an
15 entity to make the contributions in the first place *See* 11 C F R § 110 1(g)(5). Instead, the
16 Committee's letters in response to the LLC contribution checks invite the attributed individual
17 contributors to categorize the contributions as coming from "personal funds of a corporate
18 drawing account, such as a draw against salary, wages, dividends, etc." Each individual
19 contributor appeared to agree with this categorization by signing in the space provided While
20 the Commission permits contributions from corporate employees drawn on nonrepayable
21 corporate drawing accounts, *see supra*, the contributions here do not appear to be drawn on such
22 accounts First, the checks appear to be drawn on the general treasury account of an LLC, no
23 account name is indicated on the checks relating to a possible nonrepayable drawing account

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1 Second, the attributed individual contributors may not even be employees of the LLC. None of
2 the attributed contributors listed Winterhawk as their employer, but the Committee disclosed
3 Winterhawk as the employer of all four individuals.

4 Thus, if Winterhawk has elected federal income tax treatment as a corporation, its
5 contribution checks may constitute impermissible corporate contributions. Therefore, there is
6 reason to believe that Dennis Gay, the individual who signed the Winterhawk checks and
7 appears in public records as both a member and a manager of Winterhawk, violated 2 U.S.C.
8 § 441b(a) for consenting to corporate contributions.

9 If, in the alternative, Winterhawk is treated as a partnership, its checks to the Committee
10 constitute contributions from the LLC itself as well as from the "partners" of the LLC. *See*
11 11 C.F.R. § 110.1(e).⁸ Thus, Winterhawk, in writing checks to the Committee in the amounts of
12 \$4,000 and \$5,000, contributed \$9,000 to the Committee in connection with the convention and
13 general elections. As for the "partners" of this LLC, public records from Utah identify Dennis
14 Gay and Gina Gay as members of Winterhawk. By analogy, these members may be the
15 "partners" to which the LLC contributions may be attributed if the LLC is treated as a
16 partnership. *See* 11 C.F.R. § 110.1(e) (such attribution shall be in proportion to each partner's
17 share of the profits, or, by agreement of the partners, as long as only the profits of the partners to
18 whom the contribution is attributed are reduced and these partners' profits are reduced in
19 proportion to the contribution attributed to each of them). Attributing the LLC contributions
20 among the members/partners appears to result in excessive contributions on the part of those
21 individuals. Winterhawk's \$9,000 in contributions is attributed \$4,500 each to Dennis Gay and

⁸ Persons with an ownership interest in an LLC are called "members" rather than "partners." *See* Utah Revised Limited Liability Company Act, Utah Code Ann. § 48-2c-102(14).

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1 Gina Gay. Thus, there is reason to believe that Dennis Gay and Gina Gay each violated 2 U.S.C.
2 § 441a(a)(1)(A).

3 Finally, there appear to be contributions made in the name of another whether
4 Winterhawk was were treated as a corporation or as a partnership. The Act prohibits
5 contributions made in the name of another person and prohibits a person from knowingly
6 permitting her name to be used to effect such a contribution. *See* 2 U S C § 441f If
7 Winterhawk was treated as a corporation, then it made contributions in the names of the various
8 individuals to whom the contributions were attributed If Winterhawk was treated as a
9 partnership, then the attributed partners made contributions in the names of the other individuals
10 who are not partners In addition, the various attributed individual contributors may have
11 knowingly permitted their names to be used to effect the LLC contributions on their behalf *See*
12 2 U.S.C § 441f. Therefore, there is reason to believe that Bodee Gay, Dennis Gay, Gina Gay,
13 Kim Gay and Haley Gay violated 2 U.S C. § 441f.

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